75-1294

Supreme Court, U. S.
FILED
APR 12 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 75-5012

In the Matter of

THE BOHACK CORPORATION,

Debtor,

THE BOHACK CORPORATION,

Petitioner,

against

GENERAL WAREHOUSEMEN'S UNION, LOCAL NO. 852. AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AS AGENT.

Respondent.

ANSWERING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIEGEL, SOMMERS & SCHWARTZ
By: LEONARD SCHWARTZ
A member of the Bar of the United States Supreme Court
Attorneys for Respondent
225 West 34th Street
New York, New York

IN THE

Supreme Court of the United States

October Term, 1976

No. 75-5012

In the Matter of

THE BOHACK CORPORATION,

Debtor,

THE BOHACK CORPORATION,

Petitioner,

against

GENERAL WAREHOUSEMEN'S UNION, LOCAL NO. 852. AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AS AGENT.

Respondent.

ANSWERING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of the Case

The question as presented by the Appellant and the principal Statutes involved as set forth in the Appellant's Brief are substantially correct.

The allegations set forth in the Statement of the Case in the Appellant's Brief are also substantially correct.

The Reasons for Opposing the Writ

It is respectfully submitted that the Appellant has failed to set forth proper reasons why this Court should entertain the petition for the Writ of Certiorari as provided for in Rule 19 of the Rules of this Court. There has been no conflict of decisions by Courts of Appeals on the matter in issue. It is further submitted that none of the other provisions of Rule 19 of the Rules of this Court are involved in the case at bar.

The Appellant has referred to the decision of the Court of Appeals for the Second Circuit *In the matter of Straus-Du Parquet, Inc.* v. *Local Union #3 International Brotherhood of Electrical Workers, A.F. of L., C.I.O.*, 386 F. 2d 649 (2d Cir. 1967) which was the predecessor decision relating to the matter in issue. However, the Appellant seems to overlook completely the rationale of the decision in the *Straus-Du Parquet, Inc.* case which has been affirmed by the decision of the Court of Appeals for the Second Circuit in the case at bar.

In the case at bar and in the *Straus-Du Parquet, Inc.* case, the Court of Appeals for the Second Circuit resolved the matter upon the question of when did the action accrue in favor of the workers. It should be pointed out that there has never been any issue before the Courts below with respect to the interpretation of the provisions of Section 64(a)(1) and Section 64(a)(2) of the Bankruptcy Act. The reasoning of the Court of Appeals as set forth in the opinions of Judge Hays and Judge Waterman in the *Straus-Du Parquet, Inc.* case and as followed by the Court of Appeals in the case at bar is to the effect that the cause of action of the Respondents did not accrue or come into being until the Appellant terminated the employment of the workers in question. Therefore, if the employees of

the Appellant were never terminated, they had no legal cause of action nor could they assert any claim under any of the provisions of Section 64 of the Bankruptcy Act for severance pay. In fact, at the present time, there are still some employees covered by the contract between the parties hereto who are yet in the employ of the Appellant and who do not have any claim for severance pay against the Appellant.

It is respectfully submitted that the distinction must be made that until the Appellant, the employer in question, commits the act of severing the employment of the employees in question, these employees have no cause of action and have no claim for severance pay. Furthermore, it is submitted that in the event the employees should resign their position or in the further event that any of the employees in question should die, neither the employees nor their estate would have any claim whatsoever against the Appellant for severance pay.

It is respectfully submitted that the Appellant deliberately ignores the import of the decision of the Courts below who have indicated in their decisions most clearly that the basis of the claims of the Respondent takes place at the time when the severance is committed by the Appellant. Until the Appellant acts to terminate the employment of the employees, these workers have no claim for severance pay.

It is conceded by all parties that the employees involved in this case were terminated during the Chapter XI proceeding. Therefore, the cause of action arises at the moment when the termination takes place by reason of the act of the employer, the Appelant in this case. This cause of action arose during the Chapter XI proceeding when the Appellant was acting and still acts as a Debtor-In-Possession. It would therefore necessarily have to fol-

low that the cause of action of the employees would be similar to any other cause of action that would accrue to any other creditor whose right of action takes place during the pendency of the Chapter XI proceeding. It is quite clear that any cause of action that arises during the pendency of the Chapter XI proceeding is an administration expense claim as provided for in Section 64(a)(1) of the Bankruptcy Act. It is submitted that the Court of Appeals for the Second Circuit in the *Straus-Du Parquet* case and in the case at bar both decided that until the employer terminated the employment of the workers, these employees had no right to a claim for severance pay. Therefore, the provisions of Section 64(a)(2) could not apply to a claim for severance pay and that this was never intended by Congress in the enactment of Section 64(a)(2) of the Bankruptcy Act.

It is respectfully submitted that the reference by the Appellant to the economic conditions of the times and the filing of petitions for Arrangement of companies should be taken into consideration by this Court are improper and would lead to a great deal of confusion. In fact, the reference to the cases by the Appellant are even inaccurate because a reference to the *matter of the Penn Central* refers to a case that is not even a Chapter XI case but is a Railroad Reorganization case. Furthermore, any reference to the fact that there is a comparison between the reasons for the failures of the Penn Central, Railway Express, W. T. Grant and other corporations and severance pay claims is too ridiculous for embellishment. The reasons why there is no connection whatsoever between the two positions is that the severance pay claims in those matters do not come into issue at the time of the filings of petitions for Arrangements or Reorganizations under the Bankruptcy Act. The

claims for severance pay may never come into existence if the services of the employees in question are never terminated. It is further submitted that the fluctuation of the economic times of the country cannot be asserted for an interpretation of the Bankruptcy Act. It is respectfully submitted that we cannot have one set of decisions when the economic conditions of the country may be at a low and then have another set of decisions when prosperity may reign.

It is further submitted that the statements made by the Appellant that the reasons for the failure of Railway Express and W. T. Grant to achieve reorganization due to severance pay claims is too ridiculous for words and is not predicated upon any facts whatsoever. The truth of the matter is that all published statements made by management of W. T. Grant has been to the effect that the reason for its failure is due to the fact that it opened a great number of stores in bad locations with onerous leases and also due to the poor economic conditions of the country. With respect to the *Railway Express* case, again there was no connection between the severance pay claims of employees and the reasons for its failure. In fact, the Unions representing the employees were willing to take over the operation of the Railway Express Agency but were denied this opportunity. In the case of the Penn Central, certainly the question of severance pay claims never even entered into the reasons for the necessity of filing a Railway Reorganization petition in bankruptcy. The reasons given were the dramatic drop in the railroad business. It was indicated that passenger travel had dropped materially, investments that had been made turned out very poorly and even the freight business of the Penn Central which at one time was very lucrative had dropped quite dramatically. Cer-

tainly, any reference to the increase of filings of petitions in bankruptcy have no connection whatsoever with the case at bar. In addition, the Appellant very conveniently overlooks the fact that the number of personal wage earner petitions in bankruptcy have risen at an alarming rate during the past few years where they now amount to over 200,000 personal petitions in bankruptcy of wage earners per year and certainly the Appellant could not indicate that severance pay would be a reason for the filing of a petition in bankruptcy by a former wage earner.

It is respectfully submitted that the cases referred to by the Appellant with the exception of one case decided by a lower court have absolutely no relevancy to the case at bar.

The Appellant refers to a recent holding by the *Second Circuit in Shopmen's Local Union No. 445 (NLRF)* v. *Kevin Steel Products, Inc.,* 519 F.2d 698 relating to the holding that a Bankruptcy Court has the right to approve a Debtor's rejection of an executory labor contract. There is no issue involved with respect to the question of the right of a Debtor to reject an executory labor contract. What the Appellant fails to indicate to this Court is that the labor contract between the Appellant and the Respondent has not been rejected and is in full force and effect at the present time. It is respectfully submitted that an application was made by the Appellant to reject the labor contract between the parties but the application was withdrawn after an answer had been filed by the Respondent on the grounds that the labor contract was not onerous or burdensome to the Appellant. At that time when the application was made by the Appellant, there were approximately five employees covered by the labor contract between the parties and the Respondent was ready to prove that the contract was not onerous and burdensome. Therefore, any reference to the

Shopmen's Local Union No. 445 (NLRF) v. *Kevin Steel Products, Inc.* case and the case at bar is completely ridiculous and inapplicable. It should be pointed out that the thrust of the cases involving the question of the right to reject an executory labor contract involves the question of the right of Congress to enact a Statute to grant to a debtor or trustee the right to reject an executory labor contract and the provisions of the National Labor Relations Act. The thrust of those decisions has been that Congress intended to grant to the Bankruptcy Court under the provisions of Section 313 of the Bankruptcy Act the right to permit a Debtor-In-Possession or a trustee the right to reject this executory labor contract. The substance of the decision in the *Shopmen's Local Union No. 445* case and several other cases of similar nature has been merely to indicate that the Courts should conduct a hearing to determine the equities and that Congress intended to grant to the Bankruptcy Act the right to permit the rejection of an executory labor contract but also stated that the equities of the parties should be considered at a hearing on the issues.

The only case where there would appear to be a conflict is that *Mammouth Mart* case which was published in Corporate Reorganization Reporter Bankruptcy Court on May 29, 1975 at pp. 909-912. However it should be pointed out that this decision was by a Bankruptcy Judge and the Appellant conveniently omits to advise this Court that the decision of Bankruptcy Judge Harold Lavien in the Mammouth Mart case is presently on appeal to the United States District Court of Massachusetts and has not been decided. Therefore, it cannot be asserted that the decision of Bankrupcty Judge Harold Lavien is equivalent to a decision of the Court of Appeals for the Second Circuit. The Court of Appeals for the First Circuit has not as yet made any deci-

sion on this matter and therefore as provided for in Rule 19 of the Rules of this Court, there is no conflict between decisions of Courts of Appeals in two or more Circuits. A reading of the decision of Bankruptcy Judge Harold Lavien clearly indicates that he ignored the main thrust of the decision of the Court of Appeals of the Second Circuit in the *Straus-Du Parquet* case or in the case at bar by reason of the fact that Bankruptcy Judge Harold Lavien clearly ignores the question of when the cause of action arose in favor of the workers. In addition, the reference to the types of administration expense claims by Bankruptcy Judge Harold Lavien is clearly in error when he ignores the fact that causes of action that may have arisen during the pendency of the Chapter XI proceeding for merchandise sold by creditors or work, labor and services performed by creditors would be entitled to be considered as administration expense claims of the Debtor-In-Possession or a Receiver or Trustee appointed by the Court during the pendency of the Chapter XI proceedings. It is respectfully submitted that his decision is completely too narrow to limit administration expense claims to what one might consider the costs of administering a case. The Courts have consistently held that costs and expenses of administration would take into consideration any and all causes of action that arise during the pendency of the Chapter XI proceedings. If one were to give any credence to the decision of Bankruptcy Judge Harold Lavien, it would necessarily follow that a Debtor-In-Possession, a Receiver or Trustee appointed to administer a Chapter XI proceeding could purchase merchandise or employ parties to render services and that the amount due to the person would not be considered as expenses of administration. Certainly, Congress never intended a person to be able to avail themselves of the benefits of Chapter XI of the Bankruptcy Act without being responsible for the payment of those obligations that were incurred during the pendency of the Chapter XI proceeding.

The Court cannot consider the decision of the Mammouth Mart case as a matter that has received a final determination by the Courts of the First Circuit and this would not comply with the provisions of Rule 19 of the Rules of this Court.

The Appellant refers to the matter of *In re Public Ledger,* 161 F.2d 762. It should be pointed out that this case was decided in 1947. It also involved a matter that was not a Chapter XI case. The *Public Ledger* case was a Chapter X proceeding and involved a proceeding where there was not a continuation of the operation of the business but in fact was a case where a Receiver was appointed by the Court and the Receiver proceeded to liquidate the assets of the bankrupt. In addition, the primary concern of the Court related to the question of vacation pay and the question of discharge of employees was simply a collateral issue.

It should be further pointed out that in the *Public Ledger* case which was decided 20 years prior to the decision of the Court of Appeals for the Second Circuit in the *Straus-Du Parquet* case, there were a few employees who were retained by the Receiver simply for the purposes of liquidating the assets of the bankrupt. It should be further pointed out that the provisions of Section 64(a)(1) in its present form were amended in 1967 which was 20 years after the decision of the *Public Ledger* case. That part of Section 64(a)(1) that was amended in 1967 refers to expenses necessarily incurred by a Debtor-In-Possession, Receiver or Trustee and therefore, the Public Ledger case

can certainly not be considered as being in confiict with the case at bar.

The Appellant continues to stress the position that severance pay should be considered as wages incurred prior to the Bankruptcy Act and should be limited to the provisions enacted by Congress in Section 64(a)(2) of the Bankruptcy Act. However, the Appellant takes a hypocritical position. The employees covered by the Union contract with the Respondent are not the only employees of the Appellant. Does the Appellant make any provision for severance pay claims of the other employees? The answer is in the negative. There are over 3,000 additional employees and no provision is made whatsoever for severance pay benefits to these employees although there is such a provision in the various Union contracts including the contract between the Appellant and the Respondent for the employees who are still employed by the Appellant. These employees have no rights whatsoever for severance pay at this time. The result is very simple and clear by reason of the fact that the contracts specifically provide that the right to a cause of action accrues only when the employee is terminated by the act of the employer. None of these employees have been terminated and they are still on the payroll of the Appellant. The question then arises whether the Appellant has listed these employees as being entitled to a priority position to the extent of $600.00 and as an unsecured claim for the balance due them for time that has been earned from the date of their employment to the present time as creditors of the Appellant. Of course, the Appellant takes the position that there is nothing due to these employees by reason of the fact that they are still in the active and gainful employ of the Appellant. Therefore, they are not entitled to any severance pay claim.

The cases referred to by the Appellant with respect to taxes that fall due for pre Chapter XI wages as not being expenses of administration have absolutely no connection or relationship with the case at bar. In those cases, the taxes fell due as stated by the Appellant at the time that the wages were earned. The taxes did not become due and payable during the Chapter XI proceeding but became due and payable at the time that the wages were earned which was prior to the Chapter XI proceeding. Therefore, it is not necessary to even consider the cases referred to by the Appellant in this connection.

The Appellant refers to the case of *In re Ad Service Engraving Company,* 338 F.2d 41 (6th Cir., 1964) as being a case involving severance pay. It should be pointed out that the *Ad Service* case was not a Chapter XI case and did not involve the termination of employees by a Debtor-In-Possession. The *Ad Service* case is a matter involving the filing of an involuntary petition in bankruptcy on February 27, 1961 and the alleged bankrupt was thereafter adjudicated as such on March 8, 1961. Furthermore, the *Ad Service* case was a matter involving vacation pay and Congress has specifically covered vacation pay claims in Section 64(a)(2) as being a wage claim. There is no similarity or connection whatsoever between the *Ad Service Engraving Company* case and the case at bar.

The Appellant refers to the matter of *In re Men's Clothing Code Authority,* 71 F.Supp. 469 (S.D.N.Y.) as being authority for their position. This case not a Chapter XI proceeding. The case refers to a straight bankruptcy case where a claim is made for vacation pay as well as damages sustained prior to the bankruptcy proceeding by reason of the filing of the petition in bankruptcy. There is no claim made in the *Men's Clothing Code Authority* case for sever-

ance pay and it is completely irrelevant and has no connection whatsoever with the case at bar.

The Appellant cites the case of *In re Otto,* 146 F.Supp. 786 (D.C. Cal. 1956) as being authority for their position. This case also has no connection whatsoever with the case at bar. The *Otto* case refers to a claim being made for contributions to a welfare fund. There is no question but that a claim for contribution to a welfare fund is not entitled to priority of any type and that it is simply a general unsecured claim. This matter has been resolved by the Supreme Court of the United States in the case of *United States* v. *Embassy Restaurant, Inc.,* 359 U.S. 29 (1959). Certainly, the *Otto* case has no relationship whatsoever with the facts involved in the case at bar.

The Appellant refers to the case of *McCloskey* v. *Division of Labor Law Enforcement,* 200 F.2d 402 (9th Cir., 1952) as authority for their position. Again, it should be pointed out that the *McCloskey* case was not a Chapter XI case but was a matter where the bankrupt originally made a General Assignment for the Benefit of Creditors and subsequently an involuntary petition in bankruptcy was filed. Thereafter, the bankrupt was adjudicated as such. It is also quite interesting to note that in the *McCloskey* case, Judge Healy wrote

> "The right to the severance wages arose only on the happening of the contingency specified in the contract."

It would therefore appear that Judge Healy would have been in complete agreement with the reasoning of the Court in the *Straus-Du Parquet* case as well as the case at bar because Judge Healy would have decided that the cause of

action arose during the Chapter XI proceeding and it was at that time that the Respondent was entitled to its claim.

At this point, it should be submitted for the edification of this Court that this Appeal is not being prosecuted in good faith. The Appellant has gone to great lengths to try to convince this Court that to grant the Respondent the relief that has been awarded to the employees will prejudice the ability of the Appellant to confirm an arrangement with its creditors. Fortunately, the true intent of the parties has been revealed quite recently. Finally, after several years since the filing of the petition for Arrangement by the Appellant, a Plan of Arrangement has been filed by the Appellant with the Bankruptcy Court. This Plan of Arrangement calls for the payment of the claim of the Respondent in full pursuant to the Stipulation of Settlement between the parties if the Appeal of the Appellant is denied by this Court. In other words, adequate provision has been made for the payment of the claims of the employees covered by this Union contract in the Plan of Arrangement. It should also be stressed that the employees of the Respondent Union have cooperated fully and have granted the Appellant an extension of time to pay their claims in order to assist in the formulation of a Plan of Arrangement. What is most interesting is that if the Appellant were successful in this Court, the Appellant would be unjustly enriched to the extent that it would not be required to pay the claim of the Respondent. There is no provision in the Plan of Arrangement which would indicate that any funds that would be saved by not being required to be paid to the employees would be for the benefit of the other general unsecured creditors. In fact, the Appellant is a creditor in excess of $100,000.00 for health and welfare benefit payments that

were not made by the Appellant and by reason of the decision of this Court in the celebrated *Embassy Restaurant* case, the Respondent is a general unsecured creditor for unpaid health and welfare benefit claims. It is, therefore, most interesting to note that the Appellant and the Creditors Committee have arrived at a proposed Plan of Arrangement which has been approved by the Creditors Committee and which calls for the payment of the Respondent in full in the event that this Appeal were to be decided in favor of the Respondent.

It is respectfully submitted that if any equities of parties should be considered, this Court should consider the claims of employees who have devoted 40 or more years of their lives working for this Appellant and after this length of service are now being terminated and the Appellant is attempting to throw them a bone of allowing them a claim of $600.00 as a priority creditor.

It should be pointed out that the tendency of Congress in recent legislation has been to protect the interest of the workers and in the recent enacted legislation involving pension rights of employees, the provisions of the congressional action has been to vest the benefits for the benefit of the employees so that their interest will be rightfully protected.

It is also further submitted that the reference by the Appellant to provisions with respect to attitude of the report of the Commission on the Bankruptcy Laws of the United States has been misconstrued by the Appellant. A reading of the report of the Commission on Bankruptcy Laws of the United States is quite to the contrary. It is the feeling not only of the Commission on the Bankruptcy Laws of the United States but the feeling of all Bankruptcy Law practitioners, professors, legislators and other persons involved that the present $600.00 wage priority is wholly

inadequate and that it should be increased to $1,200.00 by reason of the increased standard of living and to attempt to grant a priority which would resemble the poverty scale of wages. In fact, the passage of the present proposed Laws before Congress would not change the rationale of the decision of the Court of Appeals of the Second Circuit in the *Straus-Du Parquet* case or the case at bar but would simply increase the priority claims for those employees who are severed prior to the filing of the petition in bankruptcy. At the present time, if an employee were severed prior to the filing of the petition in bankruptcy, his claim for priority is limited to $600.00. The thrust of the proposed new bankruptcy Act would be to increase the claim of the employee as a priority creditor to the sum of $1,200.00.

In addition, it should be pointed out that the sentiment in Congress has been to protect the interest of employees and in addition to protecting employees to have their pension claims vest immediately after payment into the pension fund, there are additional protective measures granted such as the establishment of lien rights to the employees for unpaid contributions to the retirement funds. Therefore, the comments of the Appellant that the trend of Congressional legislation is to limit the rights of the workers is without any basis in fact.

It is respectfully submitted that this case does not involve the question of an interpretation of a Statute enacted by Congress. There is no question betwen the parties with respect to the interpretations of Section 64(a)(1) and Section 64(a)(2) of the Bankruptcy Act. The sole question to be determined is whether an interpretation of the facts of the case indicates which Section of the Bankruptcy Act is applicable to the case at bar. The determination by the Court of Appeals for the Second Circuit in the *Straus-Du*

Parquet case and the case at bar indicates that the interpretation of the facts gives rise to the position that the cause of action accrued at the time that the employer terminated the employment of the claimants. Therefore, the cause of action accrued during the period when the Appellant operated as a Debtor-In-Possession and in view of those circumstances, it is abundantly clear that Section 64(a)(1) would apply to the claim of the Appellant.

It is therefore quite clear that the Appellant has failed to establish that this Court should grant the petition for a Writ of Certiorari as provided for under any of the provisions of Rule 19 of the Rules of this Court.

CONCLUSION

It is respectfully submitted that the petition for Certiorari should be denied.

Respectfully submitted,

SIEGEL, SOMMERS & SCHWARTZ
By: LEONARD SCHWARTZ
Attorneys for Respondent
A member of the Bar of the
United States Supreme Court